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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1065

J. B. McBeth, Individually and
as Next Friend of Roger McBeth,
Petitioner,

v.

The Texas & Pacific Railway Company,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

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The Texas & Pacific Railway Company,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

Your Petitioner, J. B. McBeth, Individually and as Next Friend for Roger McBeth respectfully petitions for the issuance of a Writ of Certiorari to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas in its cause number 16,796 styled as above.

OPINION

The opinion of the Court of Civil Appeals (A-13 to A-31 here in) is reported at ... S.W. 2d ....

JURISDICTION

This case was filed in the 153rd Judicial District Court of Tarrant County, Texas (TR. 2). Demand for trial by jury was duly made and the jury fee duly paid (TR. 209). Upon Respondent's Motion for Summary Judgment, the case was tried to the court without a jury and judgment was rendered on the 9th day of June, 1966, that the Texas & Pacific Railway Company was entitled to a judgment as a matter of law and that Petitioner should take nothing by his suit (TR. 186). Findings of fact were made by the trial court as to forty-two separately numbered matters (TR. 190; A-1) and conclusions of law based upon such facts were set forth in thirteen separately numbered propositions (TR. 197; A-9). The judgment (A-32) and opinion (A-13) of the Court of Civil Appeals affirming the findings and judgment of the trial court were dated and entered March 24, 1967. A timely Motion for Rehearing filed April 5, 1967 was overruled April 21, 1967 (A-32). Thereafter, Petitioner's Application for Writ of Error to the Supreme Court of Texas, timely filed in the Court of Civil Appeals May 22, 1967 and in the Supreme Court June 2, 1967, was refused without opinion on October 4, 1967 (A. 33) and Petitioner's timely Motion for Rehearing filed October 19, 1967 was overruled without opinion on November 1, 1967 (A-34).

The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3) since the Petitioner was denied the right of a trial by jury by the granting and affirmation of the summary judgment by the courts below.

QUESTIONS PRESENTED

1.

In a civil case, does the guarantee of due process provided by the Fourteenth Amendment include a right of trial by jury in state courts of equal dignity to the right of trial by jury in federal courts provided by the Seventh Amendment?

2.

In a civil case, does the action of a state court in holding that there were no fact questions presented for decision by a jury violate the 'fundamental fairness' guarantee provided by the due process clause of the Fourteenth Amendment when it appears from the record that fact questions were, in truth and actuality, presented and a jury duly demanded?

3.

Did the summary judgment granted by the state courts below deprive the Petitioner of the right of trial by jury in violation of the guarantee of due process accorded to Petitioner by the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

(Text at A-34)

Constitution of the United States, Amendment Seven

Constitution of the United States, Amendment Fourteen

28 U.S.C., § 1257(3)

Constitution of the State of Texas, Article I, Sec. 15

Rule 166-A(b) and (c), Tex. Rules Civ. Proc.

STATEMENT OF THE CASE

How Federal Question Was Presented Below

Petitioner's federally guaranteed rights were first invaded by the trial court's final judgment. Petitioner immediately took general exception and gave notice of appeal (TR. 187), which procedure, under state law, preserved all questions for review. The federal question was raised by Point Eleven of Petitioner's brief to the Court of Civil Appeals (A-4). This point, along with all other points of error, was expressly overruled and the judgment of the trial court affirmed (A-31). The point was raised again as Point Eleven of Petitioner's Motion for Rehearing before the Court of Civil Appeals (A-32), and was again overruled by its order of April 21, 1967 (A-32). The federal question was presented to the Supreme Court of Texas by Point Six of Petitioner's Application for Writ of Error (A-33), which application was refused by order of that court entered October 4, 1967; and was again raised by Petitioner's Ground Six of his Motion for Rehearing before the Supreme Court of Texas (A-33),

which Motion for Rehearing was overruled by order entered November 1, 1967 (A-33).

Since the Supreme Court of Texas refused to consider the case on Petitioner's Application for Writ of Error, it is the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas that Petitioner seeks to have reviewed and reversed, it being the highest court of the state in which a decision could actually be obtained by Petitioner on the questions at issue. However, the judgment of that court did not become final until Petitioner's Application for Writ of Error had been refused by the Supreme Court of Texas and his Motion for Rehearing before that court denied on November 1, 1967. It is from the latter date that the time began to run in which Petitioner might file his Petition for Certiorari in this Court.

Statement of Facts

On the morning of January 14, 1964 Roger McBeth left his home in Grand Prairie to attend school at Arlington State College in Arlington. In a family automobile he traveled westward along West Main Street (Highway 80) until he reached Southwest 23rd Street. The northward extension of this street beyond West Main Street is designated Northwest 23rd Street. There he turned southward and drove across the grade crossing of Respondent's tracks. The Respondent's train struck his car in the left rear quarter panel catapulting it into the air and caused Roger to be thrown to the roadbed and severely injured.

A witness who had on the same morning left Arlington and was traveling eastward to his job in Grand Prairie was at the scene and saw the accident. His name is Andrew J. Renaker and he was sitting in his pickup truck at a stop sign which controlled the movement of Traffic northward from Southwest 23rd Street onto Highway 80. He watched as Roger McBeth made a turn leftward off of Highway 80 onto Southwest 23rd Street, and without apparent change of speed proceed to the crossing in the path of the oncoming train. Renaker could not see Roger close enough to see just where he was looking but neither did he he see him make a distinct movement of the head in either direction. (SF p. 12)

Injuries to Roger McBeth's brain with attendant loss of memory and neurological impairment of his ability to speak have robbed him of the power to say why he drove onto the crossing with the train so close at hand. Only by painstaking reconstruction of the conditions and circumstances existing at the time of the accident are we able to bring the happening into focus. These conditions and circumstances present the grounds for several inferences and explanations. Petitioner strenuously contends that it was not the proper province of the courts below to resolve these questions as a matter of law. It is instead the proper province of the jury.

The accident occurred at approximately 7:40 a.m. (S.F. p. 2). The day was clear but unusually cold. The minimum temperature was 4° Fahrenheit and the maximum 42°, with an average temperature of 23°. This was a departure from normal of minus 22°. (TR. p. 179) At 8:00 a.m. the weather

bureau at Southwest International Airport recorded a temperature of 6° Fahrenheit. (TR. p. 178)

Roger McBeth was then 17 years of age and was enrolled at Arlington State College. He was on his way to school on that morning but the record is totally silent as to whether it was for the purpose of attending class, studying for examinations or otherwise. The trial court's finding No. 10 (TR. p. 193) that he was en route to the college "* * * for the purpose of attending a class which met at 8:00 a.m. * * *" is wholly inferential and speculative.

At the point of the accident and for several miles in either direction, the railway tracks lie between two heavily traveled east-west thoroughfares joining the cities of Dallas and Grand Prairie on the east with the cities of Arlington and Fort Worth on the west. These are U. S. Highway 80 lying to the north of the crossing and West Jefferson Boulevard to the south. Inside the city, Highway 80 is designated as West Main Street by the city of Grand Prairie, Texas. (TR. p. 96)

In January of 1964, the distance from the curbline of Highway 80 to the nearest rail of the northernmost railway track was 59 feet. It was approximately the same distance from the nearest rail of the southernmost track to the curbline of Jefferson Boulevard. This amounts to about three car lengths between the nearest curbline of each of these roads and the nearest rail of the two sets of tracks at the Southwest 23rd Street crossing. (TR. p. 96)

In January of 1964, there were no electrically operated traffic control signals either on Highway 80 to the north, or upon Jefferson Boulevard to the south of the crossing. Neither were there railway crossing gates at the crossing. Automobiles approaching Southwest 23rd Street from the east on Highway 80 and from the west on Jefferson Boulevard were required to cross the oncoming and opposing lanes of traffic on each of these roads in order to make a left turn into Southwest 23rd Street and then approach the railway company's tracks in order to get over the crossing. (TR. p. 96)

The speed limits for both Highway 80 and Jefferson Boulevard at the east of Southwest 23rd Street were 40 miles per hour in January of 1964 and to the west of Southwest 23rd Street on Highway 80 the speed limit was 45 miles per hour. (TR. p. 96) The traffic in the vicinity of Southwest 23rd Street was heavy from 7:30 to 8:30 o'clock in the morning of the week days during January of 1964 and had been that way for a long time. The physical lay out of the area created a condition where motorists approaching from the east on Highway 80 and intending to cross the railway at Southwest 23rd Street were subjected to the hazard of trains heading toward the crossing but staying behind the motorists until they had made a left turn and entered the mouth of Southwest 23rd Street. The same condition existed for all other motorists approaching from either direction upon both Highway 80 and Jefferson Boulevard. The only motorists not subjected to this condition were those approaching from the north and from the south on Southwest 23rd Street itself. For motorists approaching this crossing

from the east on Highway 80 and desiring to pass over it, it was necessary that a left turn be made at an uncontrolled intersection, that a crossing of two opposing and oncoming lanes of traffic be negotiated with appropriate lookout being maintained for the hazards thus presented, that the oncoming and opposing lanes be negotiated fast enough to clear oncoming traffic, that automobiles turning out of Southwest 23rd Street be avoided as well as those continuing north and south on Southwest 23rd Street and that after entering Southwest 23rd Street a proper lookout was required to be maintained in both directions. (TR. pps. 96-97)

On the fateful morning Roger McBeth was proceeding in a westerly direction approaching the crossing on West Main Street or Highway 80. The train was behind him and approaching in a line parallel to his direction of travel. It was running 73 minutes behind schedule, its connection at Texarkana having been late. (TR. pps. 61 and 65) Roger sounded his horn as he passed the Shamrock Service Station located at 2034 West Main Street and within sight of the crossing. The manager of the station, John Blythe, heard the automobile horn, looked to West Main Street and saw Roger waving at him. Shortly after Roger passed, Blythe saw a train going west on the tracks south of his station. Blythe stated that he did not hear the train blow its whistle or ring its bell and that he was right across the highway from The Texas & Pacific Railway tracks and could have heard the horn and bell if they had been sounded. Shortly thereafter, he heard the train make a bumping noise and saw what looked like an explosion at the crossing on South-

west 23rd Street. (TR. pps. 99-100) The Respondent attached to its motion for summary judgment affidavits to the effect that the train blew its whistle almost continuously all the way through Grand Prairie and as it approached the crossing. (TR. pps. 89-91) At the same time, it was undisputed that Roger's car was equipped with a heater and radio in working condition. Notwithstanding the direct conflict in testimony thus existing and the fact that several different inferences could have been drawn from these circumstances, the trial court resolved all questions against Petitioner by its findings No. 22, 23 and 26, to the effect that when the Respondent's train reached a whistle post located about one-quarter of a mile east of the crossing, the engineer began to sound the whistle and continued to sound it until the locomotive had passed over the Southwest 23rd Street crossing and that there was nothing to have prevented Roger McBeth from hearing the whistle from and after the time the train reached a point one-quarter mile east of the crossing. (TR. pps. 194-195)

After he passed John Blythe's service station, Roger McBeth continued in a westerly direction on Highway 80 to its intersection with Southwest 23rd Street where he was to make his left turn onto Southwest 23rd Street preparatory to crossing Respondent's railway tracks. An old rusty red car pulled out from a position immediately ahead of Renaker and turned westward on Highway 80. After it had cleared the intersection Roger McBeth made his turn. In so doing he had to stay clear of opposing traffic. Although Renaker did not undertake to estimate just how many vehicles

were involved, he testified that the traffic that morning on Highway 80 was fairly heavy "the morning rush going to work. It was—I'd just say fairly heavy traffic * * *" It was heavy enough that Roger would have had to look for an opening so that he could make the left turn. "Yes, he would have to look for an opening in traffic before you made your turn." (S.F. p. 7)

When Roger McBeth began his left hand turn from Highway 80 onto Southwest 23rd Street, his automobile was approximately 100 feet north of the northernmost rail of Appellee's railroad track and at such time and until the accident his automobile was traveling at approximately 20 to 25 miles per hour. (TR. p. 194) It is virtually undisputed in the record that the blinker light at the crossing did not become visible to Roger McBeth until after he had made his left hand turn and entered Southwest 23rd Street. (TR. pps. 97, 103, 130 and 131) At this very point, according to the witness Renaker, Roger had caught an opening in the traffic, (S.F. p. 7) and thereafter crossed the two opposing lanes of traffic and entered Southwest 23rd Street. When the rear bumper of Roger's car passed over the south curbline of Highway 80 there remained 41.5 feet between the front bumper of his car and the nearest track of the railroad. (TR. p. 103)

Petitioner introduced into the record by means of the affidavit of M. C. McLain the text of a published bulletin of the National Safety Council of the United States entitled "Stopping Distances" which reflects the findings of the National Safety Council relative to various stopping dis-

tances of an automobile in given range of speeds. By the same affidavit, Petitioner introduced the sworn statement of McLain verifying the mathematical principles, calculations and formulae employed in calculating stopping distances of automobiles traveling at various rates of speed. (TR. pps. 101-102) The matters thus shown are undisputed in the record.

The bulletin of the National Safety Council points out that: "When a driver says he can stop on a dime, he means the last dime at the end of a long row of dimes. At 20 m.p.h. —including time for reacting and braking—it takes 47 feet, three car lengths or 846 dimes to stop safely. Including time for perception takes even longer. Here's the formula:

PERCEPTION +

REACTION +

APPLICATION =

TOTAL STOPPING DISTANCE

PERCEPTION—Awareness of dangerous traffic situation and decision how to handle it. Involves:

Knowledge of accident-causing conditions.

Ability to make decision quickly.

Good physical and mental shape.

Ability to see out of car.

Attention to job of driving.

(Perception time not included in chart.)

REACTION—Time between making up mind to brake and getting foot on brake pedal.

APPLICATION—Execution of decision to apply brakes. Involves:

Physical coordination.

Ability to operate brakes.

Wasted time here means trouble an instant later. Actual braking does not occur until brake shoes are in firm contact with brake drums. Firm, steady contact must be held until car stops."

The empirically established facts reflected by this scientific data are undisputed in the record.

Notwithstanding the contradictory effect of this scientific data which showed that it would have taken at least 47 feet for Roger McBeth to stop his car after having cleared the oncoming lanes of traffic opposing him on Highway 80, the trial court made a finding of fact that within the 41.5 feet then left to him "* * * Roger McBeth had sufficient time and distance immediately prior to the accident to have

stopped the automobile he was driving within 50 feet but not less than 15 feet from the nearest rail of the Defendant's railroad tracks but he did not do so." (TR. p. 197)

Appropriate issues on the question of impossibility of compliance by Roger McBeth with Section 86 of Art. 6701 (d) were raised by the following pleadings:

> A. After the electric signal device in question became clearly visible and gave warning of the immediate approach of a train, if it did, the said Roger McBeth by the exercise of ordinary care could not have stopped his automobile within fifty feet but not less than fifteen from the nearset rail of the railroad track and could not have stopped his automobile before it reached a position upon the track itself.
>
> B. Without admitting but still denying that any audible signals were emitted by the train within 1500 feet of the highway crossing, Plaintiff says that after any such signals became audible, if they did, and such engine by reason of its speed or nearness to such crossing became an immediate hazard, if in fact such conditions occurred, the said Roger McBeth by the exercise of ordinary care could not have stopped his automobile within fifty feet but not less than fifteen feet from the nearest rail of the railroad track and could not have stopped his automobile before it reached a position upon the track itself.
>
> C. Further, Plaintiff says that after the Defendant's train became plainly visible and in hazardous proximity to the crossing in question, if it did, the said Roger McBeth by the exercise of ordinary care could not have stopped his automibile within fifty feet but not less than fifteen feet from the nearest rail of the railroad track and could not have stopped his automobile

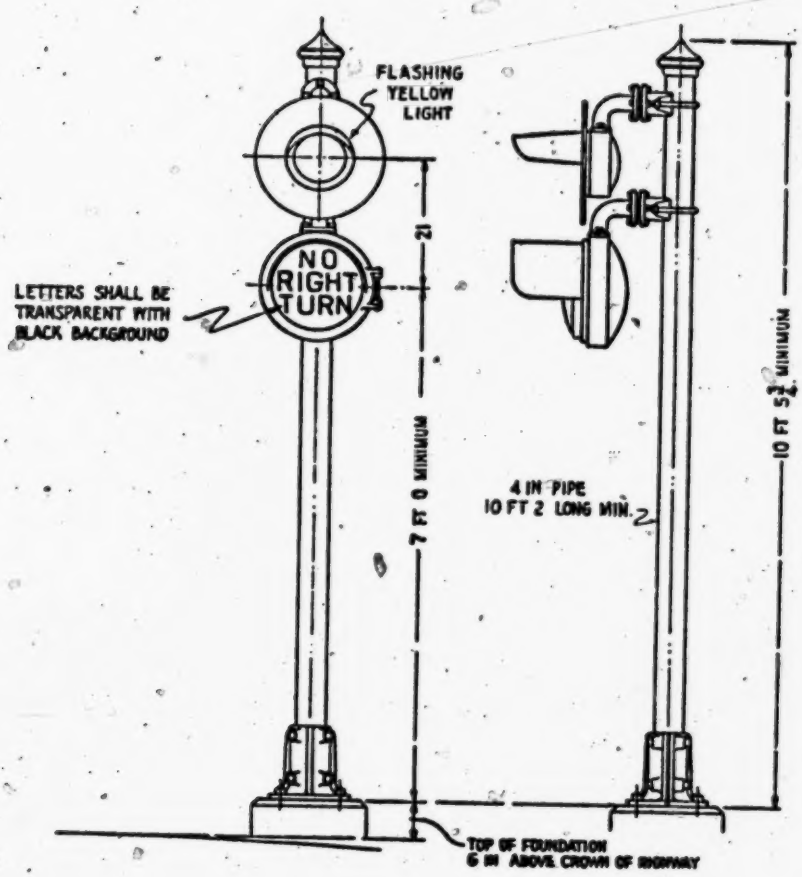
before it reached a position upon the track itself. (TR. pps. 32-33)

Petitioner's pleadings likewise raised the issue of sudden emergency, as to which it was pleaded that:

> Plaintiff would show that immediately prior to the collision in question, his minor son, Roger McBeth, was acting under an emergency which arose suddenly and unexpectedly. Such sudden emergency was not proximately caused by any negligent act or omission of the said Roger McBeth but was created by the negligent acts and omissions of the Defendant, The Texas & Pacific Railway Company. Such emergency called for immediate action upon the part of Roger McBeth without time for deliberation. After such sudden emergency arose, Roger McBeth acted as a person of ordinary prudence would have done under the same or similar circumstances. The negligent acts of the Defendant, Texas & Pacific Railway Company created such sudden emergency and were a proximate cause of the collision which is made the basis of this suit. (TR. 30-31)

The record shows without dispute that the crossing was not protected by a flagman or by crossing gates. (TR. p. 122 —Photograph No. 2 in folder) It also shows that for a crossing of this character of the American Railway Engineering Association had recommended installation of signals that would be visible to approaching motorists at a time when they were still travelling parallel to the railway tracks and before they had made a turn to cross the tracks. (TR. 108-110) It is undisputed that no such signal had been installed

at the crossing in question. The following figure is an illustrative diagram of the type of signal so recommended:



"NO RIGHT TURN" OR "NO LEFT TURN" SIGNAL

REASONS FOR GRANTING THE WRIT

The Constitutional Considerations

The first clause of the Seventh Amendment to the Constitution of the United States provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, * * *"

The Due Process Clause of the Fourteenth Amendment provides: "* * * nor shall any State deprive any person of life, liberty, or property without due process of law; * * *"

The view has long been held by many constitutional scholars that the Due Process Clause of the Fourteenth Amendment, made the entire Bill of Rights, applicable to the states. There have been fewer civil cases dealing with the question than criminal cases. At least by dicta, this view was rejected by the Court in the civil case of *Minneapolis, St. L.R. Co. v. Bombolis,* 241 U.S. 211. However, even before the Bombolis decision, the adamant position there propounded, that *none* of the first ten amendments were applicable to the states, had already been brought into question by *Chicago R. & Q.R. Co. v. Chicago,* 166 U.S. 226. There the Court held and that the Fourteenth Amendment prohibited the taking of property for public use without just compensation. Although this holding was made without expressly noticing that the same restriction was incorporated in the Fifth Amendment, the holding necessarily implied that the right thus protected was of such a character as to come within the protection of the due process clause.

In *Abington School Dist. v. Schempp,* 374 U.S. 203, 215-216, the Court held that all phases of the First Amendment

were included in "* * * the fundamental concept of liberty embodied in that [Fourteenth] Amendment."

In recent years the Court has moved rapidly to extend many Bill of Rights guarantees to state court criminal proceedings. Fourth Amendment guarantees have been extended to the states in *Ker v. California*, 374 U.S. 230; *Aguilar v. Texas*, 378 U.S. 108; and *Mapp v. Ohio*, 367 U.S. 643. Fifth Amendment protection against self-incrimination was extended to the states in *Malloy v. Hogan*, 378 U.S. 1. Sixth Amendment guarantees were extended to the states in *Klopfer v. North Carolina*, 386 U.S. 213; *Washington v. Texas*, 388 U.S. 14; *In re Oliver*, 333 U.S. 257; *Pointer v. Texas*, 380 U.S. 400; and *Gideon v. Wainwright*, 372 U.S. 335.

In the realm of state court criminal proceedings, the Court was confronted with negative views expressed in prior opinions similar to the negative view of the Bombolis case, supra. However, in *Pointer v. Texas*, the Court stated at 380 U.S. 406;

> In light of *Gideon*, *Malloy* and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the states by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law.

In respect of state court criminal proceedings, the decision to extend to the states, the various guarantees of the Bill of Rights, has turned on the Court's determination as to whether the particular guarantee in question is "* * * so

fundamental and essential to a fair trial, that it is incorporated in the Due Process Clause of the Fourteenth Amendment." *Washington v. Texas*, 388 U.S. at 17-18. In *Pointer v. Texas*, 380 U.S. at 404, the Court stated "* * * the fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that [it is] a fundamental right essential to fair trial in a criminal prosecution."

It is Petitioner's position in this case, that the fact that the guarantee of a jury trial in civil cases is a right that appears in the Seventh Amendment of the Bill of Rights reflects the belief of the Framers of those liberties and safeguards that *it* is a fundamental right essential to a fair trial in civil cases; and that its application should be extended to the states under the due process clause of the Fourteenth Amendment.

Although this will involve a re-evaluation of such decisions as *Bombolis*, supra, the Court has stated in *Malloy v. Hogan*, 378 U.S. 1:

> The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our Constitutional scheme.

It is also Petitioner's position that the right to a jury trial in civil cases is so fundamental and essential to a fair trial, that it would be necessary to incorporate it into the Due Process Clause of the Fourteenth Amendment, even if it had not been included in the Bill of Rights.

The fundamental character of this right is firmly attested by the fact that a guarantee of it has been incorporated in the constitution of virtually every state in the Union. Article I, Section 15 of the Constitution of the State of Texas provides:

> The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

In *Parsons v. Bedford*, 28 U.S. 433, the Court stated:

> The trial by jury is justly dear to the American people. * * * Every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union.

Blackstone considered trial by jury to be the sine qua non of liberty:

> The trial by jury is looked upon as the glory of the English law * * * the most transcendant privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and his equals. * * * Because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish. But it must be recollected, that those states, at the time when their liberties were lost, were strangers to the trial by jury. *Blackstones' Commentaries*, Gavit Ed. (1941) 689-90.

Speaking on a very practical plane, *Blackstone* pointed out:

> If [the judicial process] be entirely entrusted to the magistracy, a select body of men, usually chosen * * * by parties holding the highest offices in the state, their decisions will frequently haye an involuntary bias to-

> ward those of their own rank and dignity; for it is not to be expected, that the few should be always attentive to the interests and good of the many.
>
> * * * * *
>
> This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Id., 690.

In *The Federalist Number 83* (Hamilton) a similar analysis is made of the underlying factors that go to make the jury trial in civil cases a right of such fundamental character.

> * * * The strongest argument in its favor is that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter.

Even the most superficial review of the Court's recent decisions with respect to the Fourteenth Amendment makes it obvious that a much higher priority has been given to the extension of its application to criminal proceedings than to civil proceedings. This probably results from the more dramatic nature of criminal proceedings. Barbarities, patent on their face, are more easily surrendered by our society than those which are masked with subtle, sophisticated and devious strategems. The Court may have felt that it could proceed more boldly in dealing with patent barbarities.

Regardless of the reasons, the fact of priority is clear; and while Petitioner would not have the Court retract one syllable it has uttered in such recent decisions, Petitioner does

urge the Court to re-examine the order of priority of its extension of the Due Process Clause as between civil and criminal cases. There is sound reason to believe that in point of time, the denial of civil justice precedes and tends to produce criminal behavior—which in turn creates the problems attendant upon the administration of criminal justice.

The violence and crime in our streets today is unimpeachable evidence that something is seriously wrong in our society. Just what is wrong cannot be so unimpeachably established; but there is ample testimony from many authoritative sources that frustrated, repressed and angry men vent their pent up feelings in violent, irrational and antisocial ways.

If our society, through its officially established institutions, is engaged in imposing upon some of its members the very frustrations, repressions and despair that ultimate in uncontrollable anger and irrational violence, then the need for re-examination of those establishments is both urgent and imperative.

Every community (tribe, family and other social group) has its unofficial Establishment in addition to its official establishment. Without it a community could not function, grow and evolve into new forms. It is not subject to being abolished. It exists in communist societies as thoroughly and pervasively as in western democratic societies. It is in many aspects beneficial and beneficent. Inevitably, and by its very nature, the Establishment is composed of the most aggressive and power-oriented members of the community. In some instances they are also the most intelligent. It is a

phenomenon that is neither to be condemned nor praised. It is simply a fact of life with which our democratic society must learn to deal rationally and intelligently.

Every local Establishment controls in some degree its local official establishment. If the local Establishment is sufficiently cohesive, its power approaches the absolute, with the attendant degree of corruption that goes with such power. The local judicial system is subject to its influence. It nominates the appointive judges and finances the elections of the elective judges. It is the friend and ally of public officials 'worthy' of its approval. It is the implacable foe of those it disapproves. Even judges holding life tenure are much inclined to want to be regarded as worthy in the eyes of the local Establishment. Elected judges who do not maintain their worthiness are not judges for long.

Mr. Justice Tom C. Clark has described in plain yet sympathetic language the position in which a local elective judge finds himself:

> One cannot try cases when he is thinking of rallies, speeches, meetings, and other political campaigning. He cannot sit on the bench or work on opinions and decisions while he is on a political platform, kissing babies or passing out cards. I am sure most of the judges would say that politics takes a significant portion of their time. And this is true all the time, not just in a political year. Judges in politics are not unlike other politicians —*they are running for re-election all the time.* (Emphasis supplied) They cannot be blamed for this. The people have required them to stand for election, and the ambition of a judge to remain a judge is no different than that of other officeholders. Moreover, the expenses of electioneering are becoming more burden-

> some and judges' salaries are comparatively smaller than other public officers. Counting the dues for clubs, contributions for charities, etc., essential to any political figure's success, the amount runs into a sizable sum. Most judges cannot afford it. Moreover, they must deal with the political leaders, get their continued support and often use their facilities in the campaign. All these things remove the judge from his judicial atmosphere and blur his image as a non-partisan officer of the court. 50 Judicature 119

In takes no genius, then, to see that the most powerful members of a community exert a powerful influence upon the judicial apparatus of that community. And, the poor, the disadvantaged, the most completely unsophisticated people do see this fact of life; do understand it; do very justifiably view courts and lawyers with fear and suspicion; and look upon the law as their enemy. They may be inarticulate but they do understand.

If a scientific explanation of this phenomenon be needed, it has long since been supplied. In his famed letter to Professor Einstein setting forth his views on the question Why War? Professor Freud makes clear the close relationship between violence and law. It becomes apparent from his analysis that our judicial system is simply the process by which organized society brings to bear its violence upon its individual members. It is also the process through which a powerful and unchecked member of the Establishment may accomplish a socially permissible exercise of violence against a weaker member. Professor Freud says:

> You begin with the relations between Might and Right, and this is assuredly the proper starting point for our inquiry. But, for the term "might," I would

substitute a tougher and more telling word: "violence." In right and violence we have today an obvious antinomy. It is easy to prove that one has evolved from the other and, when we go back to origins and examine primitive conditions, the solution of the problem follows easily enough. I must beg your indulgence if in what follows I speak of well-known, admitted facts as though they were new data; the context necessitates this method.

Conflicts of interest between man and man are resolved, in principle, by the recourse to violence. It is the same in the animal kingdom, from which man cannot claim exclusion; nevertheless men are also prone to conflicts of opinion, touching, on occasion, the loftiest peaks of abstract thought, which seem to call for settlement by quite another method. This refinement is, however, a late development. To start with, brute force was the factor which, in small communities, decided points of ownership and the question which man's will was to prevail. Very soon physical force was implemented, then replaced, by the use of various adjuncts; he proved the victor whose weapon was the better, or handled the more skillfully. Now, for the first time, with the coming of weapons, superior brains began to oust brute force, but the object of the conflict remained the same: one party was to be constrained, by the injury done him or impairment of his strength, to retract a claim or a refusal. This end is most effectively gained when the opponent is definitively put out of action—in other words, is killed. This procedure has two advantages; the enemy cannot renew hostilities, and, secondly, his fate deters others from following his example. Moreover, the slaughter of a foe gratifiies an instinctive craving—a point to which we shall revert hereafter. However, another consideration may be set off against this will to kill: the possibility of using an enemy for servile tasks if his spirit be broken and his life spared. Here violence finds an outlet not in slaughter but in subjugation. Hence springs the practice of giving quarter; but the victor,

having from now on to reckon with the craving for revenge that rankles in his victim, forfeits to some extent his personal security.

Thus, under primitive conditions, it is superior force —brute violence, or violence backed by arms—that lords it everywhere. We know that in the course of evolution this state of things was modified, a path was traced that led away from violence to law. But what was this path? Surely it issued from a single verity; that the superiority of one strong man can be overborne by an alliance of many weaklings, that *l'union fait la force*. Brute force is overcome by union, the allied might of scattered units makes good its right against the isolated giant. Thus we may define "right" (i.e., law) as the might of community. Yet it, too, is nothing else than violence, quick to attack whatever individual stands in its path, and it employs the selfsame methods, follows like ends, with but one difference; it is the communal, not individual, violence that has its way. But, for the transition from crude violence to the reign of law, a certain psychological condition must first obtain. The union of the majority must be stable and enduring. If its sole *raison d'etre* be the discomfiture of some overweening individual and, after his downfall, it be dissolved, it leads to nothing. Some other man, trusting to his superior power, will seek to reinstate the rule of violence and the cycle will repeat itself unendingly. Thus the union of the people must be permanent and well organized; it must enact rules to meet the risk of possible revolts; must set up machinery ensuring that its rules—the laws—are observed and that such acts of violence as the laws demand are duly carried out. This recognition of a community of interests engenders among the members of the group a feeling of unity and fraternal solidarity which constitutes its real strength. A Letter from Professor Sigmund Freud, Dated September, 1932, to Professor Albert Einstein Written On The Proposal Of The League Of Nations And Its Institute Of Intellectual Co-Operation At Paris,

France Under The Topical Heading Why War? and Published In Volume 2 Of The International Series Of Open Letters In 1933; Weinberg, *Instead of Violence*, Grossman Publisher, New York, 1963, pp. 203-204.

The genius of the jury system is that it interposes a "union of the people" in microcosm between the socially ordained apparatus of violence and the individual. The more imperfectly the jury system works, the closer we are to a system of pure violence for settling conflicts of interest among men. The more perfectly it works and the more nearly that the jury is truly representative of all the people, the nearer we will be to a system of laws and not of men.

A judge can say black is white, up is down, before is after: so can a jury. The difference is that when a judge does so, the community has not acted: when a jury does so, it is the community that has acted.

Ideally, the judicial system should be like Caesar's wife, above suspicion. To the extent that a judge is believed to have been biased or corrupt in rendering a verdict (whether or not he actually was) the integrity and effectiveness of the judicial system is impaired by the shadow of doubt and suspicion thus cast across it. If the judge places upon a jury the responsibility for rendering a verdict, any resultant doubt and suspicion falls upon the community and does not impugn the judicial system itself. Moreover, in civil cases, the judge has ample and expeditious means for rectifying what he believes to have been a biased or corrupt verdict. With the stroke of a pen he can grant a new trial. Rectifying a judge's verdict is an infinitely more difficult, expensive,

time-consuming and uncertain task. Local appellate judges are subject to influences virtually identical to those falling upon local trial judges. Moreover, local appellate opinions are not subjected to the white light of publicity and intense scrutiny that falls upon the opinions of this Court. Less than a half dozen people outside the judiciary have enough knowledge of the details of this case either to approve or to criticize the opinion of the Court of Civil Appeals.

It is fully as important to maintain the appearance of justice as it is to maintain actual justice. If the members of a social group have faith in the integrity of the machinery that has been set-up to administer justice, the feelings of unity and fraternal solidarity of which Professor Freud spoke will be engendered. If the members of that group look upon the judicial apparatus with suspicion and fear and regard it as an instrument by which they are held in subjugation, then violence is the almost inevitable consequence.

A situation fraught with enormous potential for mischief is created when a single judge takes away from a jury the power to render a verdict in a case where the interests of a party manifestly vested with overwhelming power are in conflict with the interests of a party marked with none of the attributes of power. Such a decision will always be attended with doubt and suspicion; and if there be any valid reason for the jury system in the first place, it properly should be. It is to the best interest of society as a whole that such a decision be made by a jury. For the weak party, the right of trial by jury is so fundamental that it may be

equated with the right to a trial. Without it, there is too often no real trial at all.

Examining the Issues of Fact

In deciding whether there are issues of fact actually involved in this case, the Court must necessarily review the evidence presented to the trial court. Petitioner recognizes that it is the general rule that the decision of a State court upon a quesion of fact ordinarily will not be reviewed by this Court. However, there are two exceptions to this rule, stated in *Aetna Life Ins. Co. v. Dunken*, 266 U.S. at 394 as follows:

> (1) Where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.

Petitioner says that this case clearly comes within exception (2) above and also comes within the clear meaning of exception (1). A finding that there is no question of fact is a finding that there is a total absence of conflicting evidence. If there is conflicting evidence in the record then the finding is not supported by the record in the same sense employed in exception (1).

As Petitioner interprets the rules relating to the proper subject matter of this petition, it is not here appropriate to brief the merits of the evidence questions. However, extensive briefing of these matters will be found in Petitioner's

Application for Writ of Error to the Supreme Court of Texas which is made a part of the record filed herewith.

CONCLUSION

Wherefore, premises considered, Petitioner prays this Honorable Court to issue its most gracious Writ of Certiorari and to make real the promise and ideal of our Constitution so long revered by English speaking peoples everywhere and so eloquently phrased by Blackstone in speaking of the English subject: "* * * that he cannot be affected either in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbors and equals."

Respectfully submitted,

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